SMO-SPE

Office-Supreme Court, U.
FILED
JAN 11 1951
CHARLES ELMORE
CLE

IN THE

Supreme Court of the United States

October Term, 1950

No. 491

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner.*

v.

DISTRICT OF COLUMBIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DAVID R. SHELTON,
AARON L. FORD,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	4
Statement	5
Specification of errors to be urged	9
Reasons for granting the writ	11
Conclusion	21
Appendix A—Statutes involved	
Appendix B—Petition for Rehearing by Full Court	
Appendix C—Letter dated July 17, 1945, from President, Board of Commissioners, D. C., to Chairman, Committee on the District of Columbia, United States Senate	

CITATIONS.

CASES:

Brown v. Aitken, 90 Vt. 569, 99 A. 265 (1916)	21
Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 83 L. Ed. 536 (1939)	12
Hillsborough Township v. Cromwell, 326 U. S. 620, 90 L. Ed. 358 (1946)	13
Hurd v. Hodge, 334 U. S. 24, 92 L. Ed. 1187 (1948)	13
Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292, 88 L. Ed. 1283 (1944)	6, 16
Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 93 L. Ed. 585 (1949)	18
Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. 446 (1935)	12
Pennsylvania Railroad Co. v. District of Columbia, (D.C. BTA, Docket No. 1024, Opinion 656, August 18, 1947), P-H State and Local Tax Service for the District of Columbia, par. 50,006	16, 18
Queck-Berner v. Macy, 240 N. Y. 341, 148 N. E. 543 (1925)	20
Queen City Brewing Co. v. District of Columbia, 77 App. D. C. 213, 134 F. 2d. 44 (1943), certiorari denied 319 U. S. 767, 87 L. Ed. 1716 (1943)	3, 8, 13, 14, 15, 17, 19

190239

Page

Reeves, Commissioner v. Island Fuel & Transportation Co., 230 S. W. 2d 924 (1950) 16, 17, 18
Renton Investment Co. v. Commissioner, 131 F. (2d) 330, 30 AFTR 280 (CCA 3rd. Cir. 1942) 21
Schecter v. United States, 295 U. S. 495, 79 L. Ed. 1570 (1935) 12
Smoot Sand & Gravel Corp. v. District of Columbia, (1949) 84 App. D. C. 367, 174 F. 2d. 505, certiorari denied (1949) 337 U. S. 939, 93 L. Ed. 1744 ..... 1, 4
Tucker v. Alexander, 275 U. S. 228, 72 L. Ed. 253 (1927) 19, 20
Wheeling Steel Corporation v. Fox, 298 U. S. 193, 80 L. Ed. 1143 (1936) 6, 16

STATUTES:

47 D. C. Code 1201 (1940) .....App. A
47 D. C. Code 1202 (1940) .....App. A
47 D. C. Code 1207 (1940) .....11 & App. A
47 D. C. Code 1212 (1940) .....App. A
47 D. C. Code 1215 (1940) 15
47 D. C. Code 1408 (1940) .....4, 8, 10, 13 & App. A
Maryland Code, Article 81, Section 6 15
Kentucky Revised Statutes, Sections 132.190 and 132.200 17

UNITED STATES CONSTITUTION:

Fifth Amendment 4
Fourteenth Amendment 4
Commerce Clause 4
Article I, Section 8 .....4, 12

MISCELLANEOUS:

Congressional Record, 57th Congress, p. 4896..... 15
Congressional Record, 57th Congress, p. 4951..... 18
Kentucky Constitution, Sections 172 and 174..... 17
Letter dated July 17, 1945, from President, Board of Commissioners, D. C., to Chairman, Committee on the District of Columbia, United States Senate .....15, 17, 18, App. C

IN THE

Supreme Court of the United States

October Term, 1950

No.

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner.*

v.

DISTRICT OF COLUMBIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Smoot Sand & Gravel Corporation, by its counsel, prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in case No. 10,519 on July 24, 1950, as amended by order entered August 24, 1950, reversing a decision of the Board of Tax Appeals for the District of Columbia entered December 20, 1949.

OPINIONS BELOW.

The findings of fact and memorandum opinion of the Board of Tax Appeals for the District of Columbia (R.

28-38)[1] entered pursuant to the opinion and mandate of the United States Court of Appeals for the District of Columbia Circuit in case No. 9827 (*Smoot Sand & Gravel Corp.* v. *District of Columbia,* (1949) 84 App. D. C. 367, 174 F. 2d 505, *certiorari* denied (1949), 337 U. S. 939, 93 L. Ed. 1744) are not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit in No. 10,519 entered July 24, 1950, reversing the Board (R. 45-53) has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 24, 1950 (R. 54) and was amended on August 24, 1950 (R. 55). On August 4, 1950, the taxpayer filed with the Court of Appeals a petition for rehearing by the full court (R. 56-96) which was denied by Circuit Judges Proctor, Bazelon and Fahy by order entered September 18, 1950 (R. 97). On September 21, 1950, the taxpayer filed with the Court of Appeals a motion asking that the order of September 18, 1950, be vacated and that its petition for rehearing be considered by the court in banc which motion was granted on December 6, 1950 (R. 102). Also, on December 6, 1950, the Court of Appeals, with Circuit Judge Prettyman "having disqualified himself" and not participating, entered an order denying the taxpayer's petition for rehearing by the full court (R. 102-103). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and the order of this Court entered December 8, 1950, pursuant to 28 U. S. C. 2101(c), extending the taxpayer's time within which to petition this Court for a writ of *certiorari.*

QUESTIONS PRESENTED.

1. Whether District of Columbia tangible personal property taxes may constitutionally be imposed against the taxpayer

---

[1] R. references are to Joint Appendix Record in the instant case unless otherwise indicated.

(a) without any legislative standards as to either rate or basis,

(b) without any standards whatsoever established by legislation, regulations, rulings, or otherwise, and

(c) retroactively for the years 1940 through 1945 on the basis of administrative regulations to be devised at some future date without legislative authorization and to be applied against this taxpayer for the years 1940 through 1945.

2. Whether District of Columbia tangible personal property taxes may constitutionally be imposed against this taxpayer on a basis never imposed against any other taxpayer of the same class or of any other class.

3. Whether the District of Columbia taxing authorities may constitutionally systematically and intentionally single out this taxpayer for discriminatory treatment in the assessment of tangible personal property taxes.

4. Whether the opinion of the Court of Appeals in No. 10,519, entered July 24, 1950, holding that the District of Columbia tangible personal property tax law enacted in 1902, as amended, imposed tax on an apportionment basis on this taxpayer's tugs, scows and launches located primarily in Virginia and Maryland and engaged as instruments of interstate commerce, erroneously construes the applicable statute and is in direct conflict with its prior opinion in *Queen City Brewing Co.* v. *District of Columbia,* 77 App. D. C. 213, 134 F. 2d. 44 (1943), *certiorari* denied 319 U. S. 767, 87 L. Ed. 1716 (1943).

5. Whether the opinion of the Court of Appeals in No. 10,519 entered July 24, 1950, holding that the District of Columbia tangible personal property tax law enacted in 1902, as amended, provides for the imposition of tax on this taxpayer's tugs, scows, and launches on an apportionment basis—a wholly new field of taxation without any enabling legislation—contrary to the uniform administrative, con-

gressional, and judicial interpretation heretofore followed, denies due process of law and equal protection of law to the taxpayer and results in violation of the Fifth Amendment to the Constitution, Article 1, Section 8 of the Constitution, the Commerce Clause, or the Fourteenth Amendment to the Constitution.

6. Whether the District of Columbia statutes taxing personal property in the District were intended by Congress to cover and do cover only tangible personal property in the District with such a degree of permanence that it is wholly beyond the taxing jurisdiction of any state or states.

7. Whether Congress has imposed District of Columbia tangible personal property tax on tugs, scows and launches of a Delaware corporation located primarily in Virginia and Maryland and engaged as instruments of interstate commerce.

8. Whether the statute of limitations provided by 47 D. C. Code, 1408 (1940) applies with respect to years for which returns were filed in exact accordance with agreement between the taxpayer and the District tax officials who had full knowledge of all facts.

9. Whether on petition for review (No. 10,519) of a decision entered by the Board of Tax Appeals for the District of Columbia pursuant to the Court of Appeals' opinion and mandate in No. 9827 (*Smoot Sand & Gravel Corp.* v. *District of Columbia,* (1949) 84 App. D. C. 367, 174 F. 2d. 505, *certiorari* denied (1949) 337 U. S. 939, 93 L. Ed. 1744) the Court of Appeals may properly pass upon a newly raised issue in No. 10,519 that was expressly conceded in favor of the taxpayer and not presented in No. 9827 in view of the Supreme Court's direct holding to the contrary.

STATUTES INVOLVED.

The statutes involved are set forth in Appendix A, *infra.*

STATEMENT.

The taxpayer is a Delaware corporation engaged in the business of producing through underwater mining operations, transporting by water on the Potomac River and the Chesapeake Bay and their tributary system of waterways, and selling sand and gravel (S. Ct. No. 780, R. 43).[2] Production is carried on in Virginia and Maryland along the shores of the Potomac River or its tributaries and the tugs, scows, and launches involved are essential parts of the production machinery (S. Ct. No. 780, R. 34-35). Direction and control of both production and transportation have at all times been carried on primarily from the State of Virginia, principally from Alexandria, Virginia, the Registered Home Port of the facilities (S. Ct. No. 780, R. 37 and 148). Transportation is often wholly within Virginia and Maryland without in any way touching upon District of Columbia waters (S. Ct. No. 780, R. 34-35, 134 and 145). All production from the taxpayer's deposits and deliveries to the District of Columbia involve production in Virginia and Maryland and transportation in one or both States (S. Ct. No. 780, R. 145).

During all years involved the facilities have been assessed for tangible personal property taxation by Virginia at their Registered Home Port of Alexandria, Virginia, and the tax so assessed has been paid (R. 46).

In 1945 the District of Columbia asserted the alleged right to impose tangible personal property tax on the scows, tugs, and launches for 1940 and subsequent years at full value, and in 1947 the Board of Tax Appeals for the District of Columbia sustained the District (S. Ct. No. 780, R. 8, 43-49). The taxpayer petitioned the Court of Appeals for review (No. 9827), raising the identical four issues that had been presented to the Board (S. Ct. No. 780, R.

---

[2] S. Ct. No. 780 R. references are to Joint Appendix Record before Supreme Court on prior case in which the District of Columbia's petition for *certiorari* was denied (337 U. S. 939, 93 L. Ed. 1744).

2-7). These issues were, *first,* construction of the District of Columbia tangible personal property tax law, *second,* the constitutionality of the law in the event the construction of the 1902 statutes adopted by the assessor prevailed, *third,* the statute of limitations, and *fourth,* valuation (S. Ct. No. 780, R. 3-7).

No. 9827 came on for argument before Circuit Judges Edgerton, Prettyman, and Proctor as a division of the Court of Appeals and its opinion by Circuit Judge Prettyman, reversing the Board without dissent, was entered March 28, 1949 (84 App. D. C. 367, 174 F. 2d 505). Circuit Judge Prettyman found, as did the Board below, that the tugs, scows, and launches "spend more time out of the District than in the District" and stated the issue involved as follows:

> "The question is whether the District of Columbia can levy its property tax upon the full value of these tugs and scows. * * *"

The opinion of the Court of Appeals in No. 9827 pointed out that the District of Columbia was mistaken in its reliance upon *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193, 80 L. Ed. 1143 (1936), which dealt with intangible property, and was also mistaken in its reliance upon *Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292, 88 L. Ed. 1283 (1944), which dealt with the taxing power of the domiciliary state of incorporation. Accordingly, the Court of Appeals in No. 9827 reversed the Board, held that the District of Columbia "could not constitutionally tax" the scows, tugs, and launches "at full value", and did not find it necessary to pass upon or even mention either the statute of limitations issue or the valuation issue. The District of Columbia's petition to the Supreme Court for a writ of certiorari to review the judgment in No. 9827 was denied on June 20, 1949 (337 U. S. 939, 93 L. Ed. 1744).

Pursuant to notice of "further proceedings not inconsistent with the opinion of" the Court of Appeals in No. 9827, a hearing was held before the Board on July 27, 1949

(R. 1). At such hearing the District of Columbia took the position that the taxpayer was entitled to no refund and was liable for large additional amounts of tax and penalty interest for the years involved (R. 24 and 29). This position was taken by the District on the ground, advanced for the first time at the Board hearing of July 27, 1949, that it was entitled to tax on the basis of apportionment and thereby increase its assessment from 100% of exaggerated full value to 173% of such value (Appendix B, *infra*, p. 13).[3] Admittedly, no apportionment issue had theretofore been raised (Appendix B, *infra*, pp. 19-23).

It is clear that prior to the Board hearing of July 27, 1949, it was at all times expressly agreed, admitted, and conceded before the Board, the Court of Appeals, and the Supreme Court that the applicable statutes did not provide for an apportioned tax, that no issue as to apportionment was involved, and that the sole basic issue related to taxation at full value or not at all. In the course of the Board hearing of July 27, 1949, counsel for the District stated (Tr. 30):[4]

> "Mr. Updegraff: * * * Now it is true, we have said all along and we say now, that the District statute does not provide for any apportionment basis. We have consistently argued all the way up to the Supreme Court that the statute requires the tax to be imposed upon the full and true value * * *."

Also, admittedly the District of Columbia officials do not know how to impose an apportioned tax because of the complete lack of any standards whatsoever (Tr. 56-58).

---

[3] One is left to wonder why the District of Columbia petitioned the Supreme Court for certiorari in No. 9827 if it was thought that this result followed from the opinion of the Court of Appeals in that case.

[4] Tr. references are to the original record lodged with the clerk of the Supreme Court in the instant case.

The Board held that the Court of Appeals in No. 9827 had decided for the taxpayer and on November 30, 1949, entered its decision that the tax and penalty interest in controversy should be refunded (R. 38). Thereupon the District of Columbia petitioned the Court of Appeals for review (No. 10,519) raising the issue as to whether the Board had complied with the mandate of the Court of Appeals in No. 9827 (R. 39).

No. 10,519 came on for argument before Circuit Judges Proctor, Bazelon and Fahy as a division of the Court of Appeals on April 13, 1950, and counsel for the District maintained that the Court of Appeals earlier opinion in *Queen City Brewing Co.* v. *District of Columbia*, 77 App. D. C. 213, 134 F. (2d) 44 (1943), *certiorari* denied 319 U. S. 767, 87 L. Ed. 1716 (1943) was unsound and must be reversed in order that taxation on an apportionment basis might be authorized against the taxpayer in No. 10,519 (Appendix B, *infra*, pp. 21-22). Circuit Judge Fahy was of the opinion that in No. 10,519 the "case need not turn on whether or not our mandate in" No. 9827 "has been obeyed" and on the basis of the newly raised apportionment issue, non-existent facts, principles that usurp the exclusive power of Congress to enact legislation for the District of Columbia, and a construction that would, if sustained, manifestly render the applicable statute unconstitutional, under date of July 24, 1950, reversed the Board and held that tax could be retroactively imposed on an apportionment basis with the standards for such imposition to be formulated by the District of Columbia officials at some future date (R. 45-53). Circuit Judge Fahy also held that regardless of good faith, in view of the fact that the taxpayer had during each year involved filed returns in exact accordance with its agreement with responsible District of Columbia tax officials having full knowledge of all facts, the statute of limitations provided by 47 D. C. Code 1408 (1940) affords no bar to the retroactive imposition of tax on an apportionment basis to be formulated in the future (R. 53).

On August 4, 1950, the taxpayer filed a petition for rehearing by the full court in No. 10,519 (Appendix B, *infra*) with respect to Circuit Judge Fahy's opinion of July 24, 1950, and the District of Columbia interposed no objection (R. 56-96). Such petition for rehearing by the full court was denied by Circuit Judges Proctor, Bazelon and Fahy on September 18, 1950 (R. 97). On September 21, 1950, the taxpayer filed a motion asking that its petition for rehearing be considered by the Court of Appeals in banc pursuant to 28 U. S. C. 46 and the District of Columbia opposed such consideration by the full court (R. 97-101). On December 6, 1950, the taxpayer's motion of September 21, 1950, was granted by Circuit Judges Proctor, Bazelon, and Fahy and on the same date its petition for rehearing by the full court was denied with Circuit Judge Prettyman "having disqualified himself" (R. 102-103).

Detailed errors of fact and law contained in Circuit Judge Fahy's opinion in No. 10,519 are itemized and discussed in Appendix B, *infra*.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that tangible personal property tax may be imposed without legislative standards as to either rate or basis.

2. In holding that tangible personal property tax may be imposed without any standards whatsoever, legislative or otherwise.

3. In holding that tangible personal property tax may be retroactively imposed at rates determined by District of Columbia administrative officials and on the basis of a plan to be formulated at some future time by such District of Columbia administrative officials.

4. In holding that tangible personal property tax may be imposed on a basis admittedly never imposed by the

District of Columbia against any other taxpayer of the same class or any other class.

5. In holding that the District of Columbia tangible personal property tax law as enacted by Congress imposed tax on the tugs, scows, and launches involved on an apportionment basis.

6. In holding that tangible personal property tax may be imposed on a discriminatory basis when admittedly the "special treatment" accorded others of the same class is not provided for the taxpayer.

7. In holding that the "case need not turn on whether or not" the Court of Appeals' "mandate in" No. 9827 "has been obeyed" when that was the only problem before the Court of Appeals in No. 10,519.

8. In entertaining, passing upon, and reversing the Board in No. 10,519 on the basis of the newly raised apportionment issue which was repeatedly agreed, admitted, and conceded before the Board, the Court of Appeals in No. 9827, and the Supreme Court with respect to No. 9827 (S. Ct. No. 780, Oct. Term, 1948) to be in no manner involved and which issue was in fact not raised, presented, or litigated by the parties in No. 9827.

9. In finding that the tugs, scows, and launches involved "are in a tax sense more or less permanently located in the District though not always here in the same sense as real estate" contrary to the facts and contrary to the express findings of both the Board and the Court of Appeals in No. 9827.

10. In holding that the statute of limitations provided by 47 D. C. Code 1408 (1940) does not bar the assessments in question.

11. In reversing the decision of the Board of Tax Appeals for the District of Columbia.

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Court of Appeals in No. 10,519 is of general importance and the gravest concern because it provides a wholly new field of tangible personal property taxation for the District of Columbia, to be both retroactively and prospectively applied, without any enabling legislation or standards of any kind. Counsel for the District frankly and freely admits that he does not know how to administer this new field of taxation and that the District of Columbia tax officials do not know how to do so because of the complete lack of any legislative authorization or standards. In the light of nearly a half century's administrative, congressional, and judicial interpretation it was heretofore thought well settled that taxation on the basis provided for by the opinion of the Court of Appeals in No. 10,519 was not authorized in the District of Columbia. Obviously the result is chaos. In No. 10,519 the Court of Appeals has held that returns filed by the taxpayer in good faith for each of the years involved in exact accordance with its agreement with District of Columbia tax officials, who were fully informed as to all the facts, were incorrect. Clearly, counsel for the District, the tax officials of the District, and the taxpayer do not know in what respect those returns are incorrect because none of them knows what would be considered to constitute a correct return. Such uncertainty should not continue with respect to the vitally important and highly practical matter of tangible personal property taxation.

2. During all the years involved in this case and for many years prior thereto the rate of District tangible personal property taxes has been fixed by the District of Columbia administrative officials. See Compiler's note to 47 D. C. Code 1207 (1940). The Court of Appeals opinion in No. 10,519 has now held that Congress also left it to the District administrative officials to fix the basis for taxation as well as the rate of tax. Thus, if the opinion is correct,

it is entirely clear that Congress has completely abdicated and delegated the essential legislative functions granted to it by Article 1, Section 8 of the Constitution, and has simply told the District of Columbia administrative officials to "tax at your rates and on your basis." Such abdication and delegation of the legislative functions of Congress is in violation of Article 1, Section 8 of the Constitution and the opinion of the Court of Appeals in No. 10,519 is clearly not in accord with the decisions of this Court in *Schecter* v. *United States*, 295 U. S. 495, 79 L. Ed. 570 (1935) and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446 (1935).

3. Both the taxpayer and the District have always heretofore understood that the District of Columbia tangible personal property tax law did not impose an apportioned tax on the scows, tugs, and launches. The Court of Appeals' opinion in No. 10,519 provides for the reversal of such prior administrative construction and understanding and the retroactive imposition of tax. Consequently, the underlying facts giving rise to the problem of retroactive taxation with which the taxpayer is confronted are: To the "tax at your rates and on your basis" authorization held to have been given to the District of Columbia administrative officials by Congress, the Court of Appeals in No. 10,519 has also added that Congress empowered the District administrative officials to impose such tax at their own rates and on their own basis retroactively even though the taxpayer has never been advised as to the basis for the tax and, on the contrary, has always been told that Congress had not authorized the imposition of an apportioned tax. Such taxation is not proper and its authorization by the opinion of the Court of Appeals in No. 10,519 is clearly in violation of and direct conflict with the controlling principles established by this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 83 L. Ed. 536 (1939), *Schecter* v. *United States, supra*, and *Panama Refining Co.* v. *Ryan, supra.*

4. The Court of Appeals in No. 10,519 expressly held (a) that the tugs, scows, and launches involved are legally in the same class as "railroad cars and land vehicles" and (b) that for District of Columbia tangible personal property tax purposes railroad cars and land vehicles have been accorded "special treatment by Congress" not provided for the tugs, scows, and launches. The exaction of tax on such a patently discriminatory basis constitutes the taking of property without due process of law and violates the taxpayer's right to equal treatment. The Court of Appeals' opinion in No. 10,519 authorizing such patently discriminatory exaction of tax is in direct violation of principles enunciated by this Court in *Hurd* v. *Hodge*, 334 U. S. 24, 92 L. Ed. 1187 (1948), and *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 90 L. Ed. 358 (1946).

5. The Court of Appeals in No. 10,519 has effectually repealed the statute of limitations provided by 47 D. C. Code 1408 (1940) and its action in so doing is of great general importance. Apparently reporting at 100% of full value would not have been sufficiently "correct" to afford a taxpayer protection because in the instant case the District of Columbia now maintains that the "correct" basis for an apportioned tax would have required reporting at 173% of exaggerated full value. In any event it is entirely clear from the opinion in No. 10,519 that neither the District tax officials nor taxpayers know now or could have known in the past what would constitute a correct return. And the Court of Appeals in No. 10,519 has held that, regardless of good faith, returns filed in strict accordance with an agreement between the taxpayer and the District of Columbia tax officials on the basis of full knowledge of all facts are "incorrect" within the meaning of 47 D. C. Code 1408 (1940). See Appendix B, *infra*, pp. 27-28.

6. The opinion of the Court of Appeals in No. 10,519 is in direct conflict with *Queen City Brewing Co.* v. *District of Columbia, supra*, decided by the Court of Appeals for the

District of Columbia Circuit in 1943. The *Queen City* case dealt with the imposition of tangible personal property tax on beer containers remaining in the District "a few days" at a time and the instant case involves water transportation facilities remaining in the District only a few hours at a time. The Court of Appeals in No. 10,519 misconstrued *Queen City Brewing Co.* v. *District of Columbia, supra,* and was erroneously of the opinion that "there was no situs to support a District tax" in the *Queen City* case. A correct statement of the rationale of that case is:

> In the *Queen City* case there was no situs to support a District tax at full value and there was no statute imposing an apportioned tax.

It is clear from the opinion of Chief Justice Groner, Justice Miller, and Justice Vinson in the *Queen City* case that if Congress had imposed tax on an apportionment basis with respect to the beer containers such tax would have been proper and there would have been no lack of situs tc support an apportioned tax. The Court of Appeals expressly pointed out in the *Queen City* case that the beer containers could be taxed only if "legislation to reach them had" been enacted to include "a definite and fair method of 'average' assessment" and stated that "it is unthinkable that had Congress intended to bring the character of property we are concerned with here within the purview of local taxation it would not have passed adequate laws to this end."

7. The District statutes taxing personal property in the District of Columbia were intended by Congress to cover and do cover only tangible personal property in the District with such a degree of permanence that it is wholly beyond the taxing jurisdiction of any state or states. This is an historical fact fully supported by administrative, congressional, and judicial interpretation. Obviously, the holding of the Court of Appeals in No. 10,519 that District statutes providing "for a general tax" support taxation

on an apportionment basis is of very great general importance to every owner of land, water, and air transportation facilities located primarily in one or more of the states of the Union that have in the past or may in the future make deliveries to or in any way touch upon the District of Columbia. It would be difficult to imagine any case arising under the laws of the District of Columbia that would affect more taxpayers, both corporate and individual, and have greater general importance.

(a) From the legislative history of the law enacted in 1902 it is plain that the members of Congress, as representatives of their respective states, did not desire or intend to impose tax on property that was in any manner subject to taxation by any state or states of the Union. See Congressional Record, 57th Congress, p. 4896, *et seq.* In this respect Congress followed Maryland which had always taxed only tangible personal property "permanently located" in the State. *Maryland Code, Article 81, Section 6.*

(b) In *Queen City Brewing Co.* v. *District of Columbia, supra,* the Court of Appeals recognized and held that the District of Columbia tangible personal property tax law as enacted by Congress did not embrace and include "all personal property which *constitutionally* could be made the subject of taxation."

(c) In 1945 the President of the Board of Commissioners for the District of Columbia requested Congress to enact legislation authorizing the District to impose an apportioned tax on railway transportation equipment engaged in interstate commerce on the grounds that it "is believed that before property of the kind included in this bill may be taxed, there must be specific statutory authority therefor" and that "the District of Columbia has never had any such law." See Appendix C, *infra.* Congress agreed that the grounds for the request were well taken and in 1945 enacted the necessary "specific statutory authority" for taxation of railway rolling stock on a fair and equitable ap-

portionment basis which now appears as 47 D. C. Code 1215 (1940), as amended.

(d) In the administrative handling of this taxpayer's personal property taxes it was always understood until 1945 that the District of Columbia tangible personal property tax law did not cover the tugs, scows, and launches involved just as it did not cover railway equipment engaged in interstate commerce. In 1945 the District tax officials decided that under the decisions of the Supreme Court in *Northwest Airlines, Inc.* v. *Minnesota, supra* and *Wheeling Steel Corporation* v. *Fox, supra,* the tugs, scows, and launches could be taxed at full value. The District tax officials maintained, agreed, admitted and conceded that the tugs, scows, and launches could not be taxed on an apportionment basis until the hearing on the opinion and mandate of the Court of Appeals in No. 9827 held before the Board on July 27, 1949. Thus it is clear that until July 27, 1949, there was never any deviation from the uniform administrative construction that the District of Columbia tangible personal property tax law did not cover the interstate transportation facilities involved on an apportionment basis. And the District of Columbia has accepted as correct the opinion of the Board in *Pennsylvania Railroad Co.* v. *District of Columbia* (D. C. B. T. A., Docket No. 1024, Opinion No. 656, August 18, 1947), P-H State and Local Tax Service for the District of Columbia, Par. 50,006, holding that even with the specific statutory authority for taxation of railway transportation equipment engaged in interstate commerce on an apportionment basis enacted in 1945, no such apportioned tax could be imposed against the railroads prior to 1947 (Appendix B, *infra,* pp. 24-25).

(e) The Kentucky case of *Reeves, Commissioner* v. *Island Fuel & Transportation Company,* 230 S. W. 2d. 924 (1950) relied upon by Circuit Judge Fahy in No. 10,519 affords the best possible illustration as to the historical difference in fact between tax legislation enacted by Con-

gress for the District of Columbia and tax legislation enacted for the States by their legislatures. As pointed out by Chief Justice Groner in *Queen City Brewing Co.* v. *District of Columbia, supra,* Congress did not impose the District tax here involved to the full extent of its constitutional power. In the *Reeves* case, however, it was perfectly clear that Kentucky had taxed all tangible personal property to the fullest extent of its constitutional power. Thus, the Kentucky Constitution, Sections 172 and 174, expressly taxed "All property, not exempt from taxation by this Constitution" and imposed such tax "in proportion to its value, unless exempt by this Constitution." The Kentucky Revised Statutes, Sections 132.190 and 132.200, manifestly imposed tax to the full extent of the State's constitutional power with respect to all property. Such is not the case here as undeniably shown by the administrative, congressional, and judicial interpretation of the District of Columbia tangible personal property tax law. Appendix B, pp. 20-25 and Appendix C.

8. Reference to the brief in opposition to certiorari filed by the Attorney General of Kentucky in the *Reeves* case, *supra* (S. Ct. No. 277, October Term, 1950) shows that Kentucky's chief reliance was based upon the fact that its tax was "non-discriminatory." This is to be contrasted with the holding of the Court of Appeals in No. 10,519 that "special treatment by Congress" has been granted to "railroad cars and land vehicles" in the District of Columbia statutes and that such special treatment is not provided for the tugs, scows, and launches of this taxpayer. The Court of Appeals of Kentucky specifically pointed out that railway rolling stock was taxed on an apportionment basis pursuant to the Kentucky constitutional and statutory provisions applicable to the water transportation facilities involved in the *Reeves* case. The exact opposite is true of the District of Columbia as shown by Chief Justice Groner's opinion in the *Queen City* case, *supra,* pointing

out prior to the enactment of special legislation in 1945 that railway rolling stock was not taxed on an apportionment basis in the District, by the opinion in *Pennsylvania Railroad Co.* v. *District of Columbia, supra,* squarely holding that prior to 1947 railway rolling stock was not taxable on an apportionment basis in the District, and by the acquiescence of the District in the *Pennsylvania Railroad Co.* case as correct. See Appendix B, pp. 23-24, and Appendix C. Consequently, the very considerations relied upon in upholding the tax in the *Reeves* case require that the discriminatory exaction with which this taxpayer is confronted by virtue of the opinion of the Court of Appeals in No. 10,519 should be stricken down.

9. *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169, 93 L. Ed. 585 (1949) further illustrates the historical difference in fact between tax legislation enacted by Congress for the District of Columbia, carefully confined by Congress to only that property taken wholly "out of the taxable wealth of the" states (Congressional Record, 57th Congress, p. 4951), and tax legislation enacted for the states by their legislatures, designed to tax to the full limit of constitutional power. The Louisiana statutes involved in the *Ott* case provided in detail the method of apportionment and in the course of its opinion in that case the Supreme Court said:

> "* * * Louisiana's Attorney General states in his brief that the statute 'was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.' * * *"

Here, again, the exact opposite is true with respect to the District legislation involved in the instant case and the District of Columbia has repeatedly so admitted, agreed, and conceded before the Board, before the Court of Appeals in No. 9827, and before the Supreme Court on petition for certiorari with respect to No. 9827. Obviously, cases involv-

ing state statutes held by the highest court of the taxing state to authorize apportionment do not answer the problem with which we are confronted here, namely, whether the Court of Appeals in No. 10,519 has correctly held that the District of Columbia statutes authorize taxation of the tugs, scows, and launches involved on an apportionment basis to be formulated and retroactively applied in direct conflict with the opinion of the Court of Appeals in *Queen City Brewing Co.* v. *District of Columbia, supra,* and, if so, whether such taxation violates the Constitution of the United States.

10. The apportionment issue was not before the Court of Appeals at all in No. 9827 and was not properly before the Court of Appeals in the instant case, No. 10,519. The treatment accorded the apportionment issue in No. 10,519 as being properly before the Court of Appeals is in direct violation of the controlling rule laid down by this Court in *Tucker* v. *Alexander,* 275 U. S. 228, 72 L. Ed. 253 (1927).

(a) The District's brief filed with the Court of Appeals in No. 9827 stated—just as the District had admitted, agreed, conceded and maintained before the Board below—that apportionment "has no basis in the District law or applicable decisions" (p. 26). The District certified to the Supreme Court (No. 780, Oct. Term, 1948) in support of its petition for *certiorari* with respect to No. 9827 that the applicable statutes "do not permit taxation of vessels and boats on a basis of apportionment of value" (p. 24) and that "Congress has not declared any such rule of apportionment" (District's Reply Brief in No. 780, p. 7).

(b) The taxpayer's brief filed in No. 9827 advised the Court of Appeals that the District had expressly conceded that no apportionment issue was involved as follows:

"By administrative construction the respondent has always recognized that the District of Columbia

> tangible personal property tax law does not provide for taxation of the equipment involved on the basis of apportionment and has expressly conceded in this case that the 'District tax statutes involved do not provide for apportionment' * * *" (p. 6).

The District's brief in No. 9827 filed with the Court of Appeals in reply to the taxpayer's brief concurred and conceded that apportionment with respect to the tugs, scows, and launches "has no basis in the District law or applicable decisions" (p. 26).

(c) During the course of the Board hearing on July 27, 1949, on the opinion and mandate of the Court of Appeals in No. 9827 counsel for the District stated:

> "Mr. Updegraff: * * * Now it is true, we have said all along and we say now, that the District statute does not provide for any apportionment basis. We have consistently argued all the way up to the Supreme Court that the statute requires the tax to be imposed upon the full and true value * * *" (Tr. 30).

(d) The Court of Appeals in No. 9827 clearly understood that the basic question for decision was "whether the District of Columbia can levy its property tax upon the full value" of the tugs, scows, and launches and that no issue as to apportionment had been raised or presented by the parties.

The facts show that no issue as to apportionment was before the Board or the Court of Appeals in No. 9827. The newly raised apportionment issue was not properly before the Court of Appeals in No. 10,519 and its holding to the contrary is in direct conflict with the controlling rule laid down by the Supreme Court. *Tucker* v. *Alexander, supra.* Obviously, if issues conceded or for any reason not presented could be raised after denial of *certiorari,* litigation would never end and the rule enunciated in *Tucker* v. *Alex-*

ander, supra, that circuit courts of appeal may not properly pass upon issues not litigated by the parties is of general application. See *Queck-Berner* v. *Macy,* 240 N. Y. 341, 148 N. E. 543 (1925); *Brown* v. *Aitken,* 90 Vt. 569, 99 A. 265 (1916) and *Renton Investment Co.* v. *Commissioner,* 131 F. (2d) 330, 30 A. F. T. R. 280 (CCA 3rd Cir. 1942).

CONCLUSION.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

David R. Shelton,
Aaron L. Ford,
Munsey Building,
Washington 4, D. C.
Counsel for Petitioner.

January, 1951.

APPENDIX A

APPENDIX A.

Statutes Involved.

47 D. C. Code 1201 (1940):

"*Three assistant assessors to assess personal property.*

"The three members of the permanent Board of Assistant Assessors designated by the assessor, to assess personal property, shall under the direction and supervision of the said assessor, assess personal property in the District of Columbia as follows: (July 1, 1902, 32 Stat. 617, ch. 1352, Sec. 6, Par. 1; July 3, 1926, 44 Stat. 832, ch. 759, Sec. 1.)"

47 D. C. Code 1202 (1940):

"*Personal property to be assessed at its full value.*

"All personal property in the District of Columbia subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money. (July 3, 1926, 44 Stat. 833, ch. 759, Sec. 4)"

47 D. C. Code 1207 (1940):

"*Rate of taxation—Exceptions.*

"On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in section 47-1208), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia the rate of tax provided by law. (July 1, 1902, 32 Stat. 618, ch. 1352, Sec. 6, par. 2; June 29, 1922, 42 Stat. 669, ch. 249.)"

47 D. C. Code 1212 (1940):

"*Mercantile establishments and carriers by water.*

"It shall be unlawful for any person or persons entering the District of Columbia subsequent to June 30th in each year and establishing a place of business

for the sale of goods, wares, or merchandise, either at private sale or at auction, or engaging in the business of common carrier by vessels, ships, or boats to conduct such business until a sworn statement of the value of such stock, vessels, ships, and boats has been filed with the assessor of the District of Columbia, who shall thereupon render a bill for the unexpired portion of the fiscal year at the same rate as other personal taxes are levied: Provided, That this shall not apply to vessels, ships, or boats if it shall be made to appear by affidavit that any vessel, ship, or boat has been assessed for taxation and the taxes paid elsewhere."

* * * (July 1, 1902, 32 Stat. 618, ch. 1352, Sec. 6, par. 3; Apr. 28, 1904, 33 Stat. 563, ch. 1815, Sec. 2.)"

47 D. C. Code 1408 (1940):

"*Collection of personal property taxes—Time limitations—False returns—Delinquency.*

"Taxes on property reported in any return filed by a taxpayer shall be assessed within two years after the filing of such return; and such taxes may be collected by distraint or by proceeding in court within three years after the date of the assessment of such taxes. In the case of a false or incorrect return, whether in good faith or otherwise, or of a failure to file a return within the time prescribed by law or of a failure to include taxable property or assets belonging to the taxpayer in any return filed by such taxpayer, whether in good faith or otherwise, the tax may be assessed at any time, and the tax may be collected by distraint or by proceeding in court within three years after the assessment of such tax. (Aug. 17, 1937, 50 Stat. 675, ch. 690, title I, Sec. 8; May 16, 1938, 52 Stat. 357, ch. 223, Sec. 1(b).)"

APPENDIX B